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WHERE THERE IS A BREACH OF A CONTRACT, WHICH MAY BE REGARDED AS TOTAL, IS THE INJURED PARTY PREVENTED FROM RECOVERING FUTURE DAMAGES, BY BRINGING AN ACTION ONLY FOR PAST DAMAGES, WHERE THE TIME FOR FULL PERFORMANCE HAS NOT ARRIVED.

In the case of Pakas v. Hollingshead, 99 N. Y. App. Div. 472, an important question was passed upon and it seems to us an opinion was rendered which is not only opposed to principle but also to the great weight of authority. A dissenting opinion by Mr. Justice Laughlin, concurred in by Mr. Justice Hatch, was filed. August 30th the plaintiff contracted with the defendant to furnish 50,000 pairs of bicycle pedals, made August 30th, 1898, to be delivered in installments of 500 pairs per week, until Dec. 1, 1898, and thereafter 1,000 pairs weekly till whole contract was performed. The vendors after delivering 2,608 pairs of pedals, as agreed, refused to make further deliveries. March 15th the vendee brought an action against the vendors to recover damages for the vendor's refusal to deliver 19,500 pairs of pedals, being the number which should, according to the contract, have been delivered prior to the commencement of the suit, and recovered judgment for the full amount of the damages claimed. The court held that such a recovery precluded the plaintiff from bringing an action to recover for the remainder of the contract. Mr. Justice Laughlin's opinion is an able one, but there are considerations which were not gone into in the dissenting opinion, which are well worth considering. There are some important authorities also not cited.

In a very able opinion by Mr. Justice Shope, of the Supreme Court of Illinois, in the case of Lake Shore & Mich. So. R. Co. v. Richards, 30 L. R. A. 33, 152 Ill. 59, the very same question was involved. In that case the railroad company had insisted upon performing the contract in such a way as would have made the performance a very different thing from that agreed upon had the other party accepted such performance as a fulfillment of the agreement. The performance tendered was such as amounted to a total failure or abandonment of the contract, such as would have amounted to a rescission of the contract, had one party a right to rescind. Suit was brought and a recovery had up to the time of the bringing of the suit. The company continued the same kind of breaches and the court took into consideration the breaches which had been recovered upon, as evidence of the company's intention not to be further bound by the contract. The breaches recovered upon were not put into evidence in the second suit for the purpose of again recovering upon them, but for the purpose of showing that the proposed future performance on the part of the company of the contract was such as evinced an intention not to be bound by its terms. On p. 97 of the 152d Illinois Reports and 30 L. R. A., p. 59, Mr. Justice Shope says: "In connection with this point it will be proper to notice the contention that in the suit brought June 5th, 1886, before referred to, plaintiff recovered damages for all the breaches of the contract up to the bringing of that suit, and therefore such breaches, being merged in the judgment in that cause, could not subsequently be the occasion, by Richards, Maynard & Company., for treating the contract as abandoned by appellant. In bringing that suit the plaintiff undoubtedly treated the contract as subsisting, and had not then elected to treat it as abandoned by the defendant and to sue for prospective damages. The suit was brought and actual recovery had for breaches at the time of bringing it. * * * Subsequently to bringing of that action, as already shown, the railroad company refused to recede from its previous position, both in respect of its obligation under the contract to deliver cars to Richards, Maynard & Co. and to observe its contract in respect of the use to be made of the weights, and the evidence tends to show that at the time Richards, Maynard & Co. closed their transfer house appellant was denying its liability under the contract and evinced a clear intention not to be bound by its provisions." In the consideration of the question of whether there is a total failure or an abandonment of a contract it must not be forgotten that a contract is totally abandoned when one of the parties refuses to perform a substantial subsisting part of it. It is just

as much a total failure to refuse to perform a subsisting stipulation of essential importance, as it is to wholly refuse performance of all its provisions. This was determined by Mr. Justice Shope's opinion, *supra*, and the main determinations thereof have been accepted in many states.*

After the most mature deliberation on the question, which was twice brought before the Supreme Court of Iowa, growing out of the same subject-matter, the court said: "This is the third action brought for breaches of this contract by and against the same parties. The first was for damages resulting to the plaintiffs upon a breach of the contract, caused by the defendant's refusing to give the plaintiffs the handling of "*through* grain," carried to Dubuque on defendant's railroad, and passed through that city between the first day of October, 1867, and 23rd of January, 1868. The second action was brought for damages suffered by plaintiffs for a breach of the contract in the refusal by defendant to give the plaintiffs the handling of the "*through* grain" brought to Dubuque and passed through it by defendant between the 23rd of January, 1868, and first day of May, 1870. This action is brought to recover damages as for a total breach of the contract. There was a verdict and judgment for plaintiffs for $294,759.31. The court said: "Appellant's counsel say that there was error in the refusal of the court to give the first, second, and third instructions asked by them. * * * These latter embody the proposition now urged with great earnestness and ability by appellant's counsel, that prior to the commencement of the last action there was an entire and absolute abandonment of the contract by the defendants, a total breach, and that a recovery in that action, is a bar to a recovery in this. This same question was made and urged in the case in 33 Iowa, 422, by the same learned counsel with their accustomed zeal. It was there claimed upon the same grounds that a recovery in the first action was a bar to the recovery in the second. * * * Mr. Justice Beck, in delivering the opinion of the court, said, on p. 465: 'The contract must be regarded as a whole. One of the parties, by a voluntary breach of one or all its covenants, cannot impose upon the other the necessity of regarding it as wholly abandoned, or treating the breach as a total breach, whereby the innocent parties would be deprived of the advantages that would otherwise flow from them. They would have the right so to treat it, but the law will not compel them to pursue that course.'" In Frost v. Knight, L. R. 7 Exch. 111 (1 Moak 218), Cockburn, Ch. J., in delivering the opinion of the court, thus states the law after referring to previous opinions: "The promisee, if he pleases, may treat the notice of intention (*i. e.*, not to perform the contract) as inoperative, and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised notwithstanding his previous repudiation of it, but also to take any advantage of any supervening circumstances which would justify him in declining to complete it. Mr. Justice Laughlin well states the position in his dissenting opinion in the principal case, when he says, on p. 478: "It might be a great hardship to the plaintiff to hold that he could not recover damages which he had sustained down to a given time, when they become fixed and were separate and distinct from the damages he might sustain by reason of the failure of the defendant to fulfill the contract in the future," and the quotation he makes from McCleary v. Malcom Brewing Co., 56 App. Div. 531, 533, is apt and comprehensive, and is as follows: "To say that the defendant, by compelling the plaintiff to sue for the recovery of a sum of money due him may terminate a contract of which the defendant is receiving the benefit, or, what is equivalent, prevent the plaintiff from collecting the money falling due him under the contract, is to permit the defendant to reap the benefit of his own wrong under a technical rule which has no application to such a case," * * * "and another rule which is now quite well

*Mr. Justice Shope voluntarily left the Illinois Supreme Bench, a few years ago, to engage in the practice of law. One of his associates upon the Bench made the statement to the writer, a short time since, that time had shown that Judge Shope's opinions are very able ones. It is certain that the ability of the opinion, *supra*, is generally recognized and is a leading one.

settled, is that when a contract provides for the payment of money in installments, the failure to pay for an installment when due may not be regarded as a total breach, but the contract to that extent is severable, and an action will lie for the installment due, and the judgment will not bar a future action for other installments." Citing McCready v. Lindbone, 172 N. Y. 400; Seed v. Johnston, 63 App. Div. 340; Lorillard v. Clyde, 122 N. Y. 41; Walsh v. New York & Kentucky Co., 88 App. Div. 477. Mr. Justice Greenbaum, in the opinion in the principal case, says: "There is no doubt that successive recoveries under such a contract of sale as here existed would be permissible where independent causes of action are created by performance as in the case of vendor seeking to recover for deliveries made under contract in suit, but the authorities are easily reconcilable that there can be but one recovery, when the damages arise out of a single wrong." The great trouble with the majority opinion is that it makes no discrimination between the right of a party to accept a breach of a contract as subsisting for the damages already accrued and for what may accrue, as severable and distinct rights. Why should a person be compelled to regard a contract as totally abandoned (even though the acts of the other party may be regarded as a total abandonment) so as to prevent his holding the party in default for damages already accrued. "It is a very poor rule that will not work both ways" though the majority opinion holds to the contrary, in the principal case. It is well said in the case of Johnstone v. Milling, L. R. 16, 2 B. D. 467, by Lord Esher. "When one party assumes to renounce the contract that is by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation he entitles the other party, *if he pleases*, to agree to the contract being put an end to, subject to the retention by him of bringing an action in respect to such wrongful rescission." Now if he did not please to regard the contract as at an end would he by an action to recover damages to the time, be prevented from bringing an action in the future?

The dissenting opinion appears to us to be clearly right.

NOTES OF IMPORTANT DECISIONS.

CONTRIBUTORY NEGLIGENCE—LAST CHANCE.—The Supreme Court of New Hampshire in the case of Yeaton v. Boston & M. R. R., 61 Atl. Rep. 522, recently rendered an interesting opinion in which the evidence tended to show that Yeaton drove toward the crossing without exercising care to ascertain whether a train was approaching until he was within 30 feet of the track. At that point he was traveling at the rate of 4 miles an hour, and the train, running at a speed of 40 miles an hour, was some 300 feet distant. The train occupied the farther one of two tracks which crossed the highway. When a short distance from the crossing, the horse attempted to turn down the track, but Yeaton reined him about, and urged him upon the crossing. The train struck the wagon in which Yeaton was riding, and killed him instantly. The fireman saw Yeaton from a time when the train was some 900 feet from the crossing until the moment of the collision. There was evidence tending to show that the speed of the train could have been slackened, and the collision averted, by the application of the brakes at the time when Yeaton attempted to cross the track. There was a conflict of testimony as to when the brakes were applied.

The court said: "The only position taken in support of the exceptions to the refusal to order a nonsuit or verdict to instruct as requested upon the question of liability is that Yeaton's attempt to cross the track in advance of the approaching train was negligence, which must prevent a recovery in this suit. In the discussion in Gahagan v. Railroad, 70 N. H. 441, 450, 50 Atl. Rep. 146, 151, 55 L. R. A. 426, it was said: "The plaintiff's negligent occupation of the track did not authorize the defendants to run upon and injure him, if by care they could have avoided it. * * * If the engineer knew, or ought to have known, that the plaintiff's negligence would place him upon the crossing when the train reached it, the engineer was equally bound to avoid the collision as if he saw the plaintiff actually on the track." These views were adopted as the basis of the decisions in Little v. Railroad, 72 N. H. 61, 62, 55 Atl. Rep. 190, and Parkinson v. Railway, 71 N. H. 28, 32, 51 Atl. Rep. 268. The sole ground of negligence in the defendants upon which the case was submitted to the jury was whether the defendants' servants in charge of the train, observing the deceased's proximity to the railroad, did all they ought to have done to prevent the collis-

ion, after they knew, or ought to have known, of his attempt to cross the track. If men of ordinary prudence in the position of the defendants' servants would have known that Yeaton's act would place him upon the crossing at the time the train would reach it unless they did something to check the speed of the train, and could and would have avoided the collision, the failure of the trainmen to act with ordinary prudence was the legal cause of the injury. Upon the only ground of negligence charged against the defendants, Yeaton's conduct in attempting to cross under the circumstances, whether prudent or otherwise, was immaterial. The defendants had no right to kill him for his mistake in judgment, even if the error was one that a prudent man would have avoided. The defendants are equally liable, whether the injury was willfully or negligently inflicted. Felch v. Railroad, 66 N. H. 318, 320, 29 Atl. Rep. 557.

There was evidence that the trainmen could have slackened the speed of the train if they had acted when they knew, or ought to have known, of Yeaton's attempt to cross before it. Whether they could or ought to have done so was for the jury. The defendants were not injured by the submission of the question of the plaintiff's care in attempting to cross the track, even if there were no evidence upon which it could be found that a man of ordinary prudence would have made the attempt. The ruling required the jury to find a fact not material to the plaintiff's case to entitle her to a verdict. The defendants cannot complain of the additional burden placed upon the plaintiff. If the negligence charged against the defendants had been failure to give the warning signals, or to maintain a flagman, or other prior fault, the question of Yeaton's care in attempting to cross would have been material; but, as it is not, it is useless to consider whether there was evidence upon which the act could be found careful. When both parties are present, and due care on the part of either at the time would have prevented the injury, the manner in which the dangerous situation was created is immaterial, except as one of the circumstances by which the requisite degree of care is to be determined. A plaintiff who, by care, cannot escape from the danger his own negligence has created, can recover of one who, by care, could have prevented the injury, even if his inability to protect himself arises from his own prior negligence. Nashua Iron & Steel Co. v. Railroad, 62 N. H. 159, 164. It could be found that Yeaton did all a prudent man could do after he decided to cross. His inability to protect himself after such decision arises from his mistaken judgment that it was safe or best for him to make the attempt, for there is no evidence or suggestion that he intended to commit suicide. If his mistaken judgment was due to failure to carefully observe or weigh the evidence presented by the situation, and was negligence, such conclusion rendered him unable to protect himself, precisely as if he had been unable for any other reason to exercise the judgment of a prudent man. The defendants, knowing the situation, were required to exercise such care as prudent men in their situation, with the knowledge they had, would exercise. Wheeler v. Railway, 70 N. H. 607, 50 Atl. Rep. 103, 54 L. R. A. 955; Edgerly v. Railroad, 67 N. H. 312, 36 Atl. Rep. 558; Batchelder v. Railroad, 72 N. H. 528, 530, 57 Atl. Rep. 926. If their exercise of such care would have prevented the injury, their failure to so act is its sole legal cause.

Whether the expression, "the mental and physical pain suffered by him in consequence of the injury," as one of the elements proper for consideration in assessing the damages in an action where death results from the injury complained of (Pub. St. 1901, ch. 191, § 12), refers merely to mental pain resulting from the physical injury, is not important. The items of damage mentioned are not exclusive, but additional, and are to be considered "in connection with other elements allowed by law." It is not contended that mental pain preceding a physical injury, when caused by a wrongful act or neglect which results in such physical injury, is not an element of damage allowed by law. The section is a redraft of the provision as to damages found in Section 1, ch. 71, p. 454, Laws 1887, without intent to change the meaning. Commrs.' Rep. P. S., pp. iii, 615. When the commissioners used the word "injury" in place of "wrongful act or neglect," found in the earlier statute, if they did not understand the terms were identical, the addition of the general clause quoted establishes that no change in meaning was intended or made. The deceased, by his own carelessness, found himself in a dangerous position near the track. Either prudently or carelessly he attempted to cross in front of the train. He cannot recover for fright due to his own acts, whether careless or prudent. Recovery can be had only for injury resulting from the negligence charged against the defendants—the failure to slacken the speed of the train. If such negligence caused him any fright or mental suffering preceding the injury, such mental pain was properly considered on the question of damages. It appears to be conceded that there was evidence of mental pain preceding the injury. If the instructions, as applied to the facts, did not confine the attention of the jury to mental suffering chargeable to the defendants' fault, they might properly have been more definite in this respect. If the instructions were not as definite as they might have been, there was no request to make them more definite. The general objection that there could be no recovery for mental pain preceding the physical injury cannot be sustained. This conclusion disposes of the exception to the argument of counsel upon this point.

The only remaining exception relied upon in the defendants' brief is to the statement made in argument by counsel that, when the fireman saw Yeaton, and was some 800 feet from the crossing, he ought to have warned the engineer: that he

did not do so; and the argument from that fact that the firemannever notified the engineer. This suggestion did not misstate the evidence. There was evidence that the fireman saw Yeaton at least that distance from the crossing. What he ought to have done under the circumstances was an inference of fact to be found by the jury, as to which counsel could urge upon their attention his view as to the finding which should be made. The conduct of the fireman in one part of the transaction may have had some tendency to show what it was in another part. Whether the suggested inference should be drawn was for the jury.

WILLS—TRUSTS VOID BY FAILURE TO DESIGNATE BENEFICIARY.—In Iowa the *cy pres* doctrine is not recognized. The opinion of the court in Filkins v. Severin, 104 N. W. Rep. 346, which is instructive and well considered is as follows:

"In the will, construction of which is sought in this action, the testator, after providing for the payment of the debts and expenses of his last sickness and funeral, and after appointing the defendant in this action as his executor, devises a certain parcel of real property, and directed the executor to devote another parcel to the erection of a tombstone. Then, after a bequest of $100 to a devisee named, he proceeds as follows:

'That the residue of my estate, both real and personal, after above sections are complied with, be left in the hands of my executor, L. H. Severin, as trustee, and to manage said estate for the term of ten years, and I authorize my said trustee to dispose of whatever real estate or personal he may deem for the best interest of my estate at public or private sale, as he may think for the best interest of my estate, and I direct further that my trustee, L. H. Severin, hold and retain $100.00 from the residue of my estate for the purpose of caring for and improving my last resting place during the term of his trusteeship.'

The trial court held that this paragraph of the will was invalid and of no effect, and that any property which was within the control of the executor for disposition under such provision, in excess of the $100 to be retained for the purpose of caring for and improving the last resting place of the testator, should be turned over to the plaintiff, as sole heir. It is to be noticed that the provision of the will in question does not authorize or direct the disposition of the property referred to therein for charitable purposes, nor to beneficiaries to be selected by the executor. If the purpose of the trust had been specified, or if provision had been made for the selection of a beneficiary, perhaps the bequest could be sustained. Grant v. Saunders, 121 Iowa, 80, 95 N. W. Rep. 411, 100 Am. St. Rep. 310. It was held in that case that the cy pres doctrine is not recognized in this state, and cases in other states in which that doctrine has been repudiated as an attempt to exercise the prerogative power without authority conferred by the will may be properly here cited in support of the proposition that a devise in trust, which designates no beneficiary for the trust, is void: McHugh v. McCole, 97 Wis. 166, 72 N. W. Rep. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106; Tilden v. Green, 130 N. Y. 29, 28 N. E. Rep. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487; Read v. Williams, 125 N. Y. 560, 26 N. E. Rep. 730, 21 Am. St. Rep. 748; Holland v. Alcock, 108 N. Y. 312, 16 N. E. Rep. 305, 2 Am. St. Rep. 420; Gallego's Exrs. v. Attorney General 3 Leigh (Va.), 450; Moran v. Moran, 104 Iowa, 216, 73 N. W. Rep. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443. It is well settled that, if no beneficiary of the trust is named in the will creating a trust, the provision for the trust is void. 'There is in general the same necessity for a *cestui que* trust capable of taking the beneficial interest, so defined and pointed out as that there shall be no uncertainty, as there is for the properly defined grantee in a deed. If there is such uncertainty as that it cannot be known who is to take as beneficiary, the trust is void, and the heir, by operation of law, will take the legal estate, stripped of the trust.' Lepage v. McNamara, 5 Iowa, 124, 142. While the policy of the courts is to so construe wills that all the property of the testator shall be disposed of thereby, nevertheless, if there is an invalid attempt to create a trust as to property not otherwise disposed of, the trust is ineffectual, and the property is to be distributed as intestate property. Sims v. Sims, 94 Va. 584, 27 S. E. Rep. 436, 64 Am. St. Rep. 772; Boisseau v. Alridges, 5 Leigh (Va.), 222, 27 Am. Dec. 590; *In re* Willato, 21 Times Law Rep. 194 (Eng. Ch. D.). It is argued for appellant that, as no beneficiary of the trust is named, the plaintiff is the beneficiary by implication, and that defendant, as executor, is entitled to administer the trust; being accountable to plaintiff for maladministration, and for accounting at the end of the trust period. It is true that courts will sometimes resort to implication for the purpose of ascertaining an intended beneficiary. Thus in the case of Donges Estate, 103 Wis. 497, 79 N. W. Rep. 786, 74 Am. St. Rep. 885, it was held that a devise of property in trust, to be held by the trustee until testator's youngest child, if any be born to him, should attain the age of 21 years, and, in case no child were living at the time of his death, his wife should be the sole owner, was to be construed as a trust in favor of testator's children. But in the will before us there is no suggestion whatever of any beneficiary of the trust, and we are not authorized to read into the will a provision not suggested in any way by its language—that the executor is to hold the estate for the benefit of an heir who is not named in the will, and who, so far as the language of will indicates, was not in the mind of the testator at the time it was drawn. We are absolutely without any indication as to the intention of the testator with reference to the distribution of the trust estate. Even where a beneficiary is named, if the trust estate far exceeds in value the amount

necessary to carry out the provisions of the trust, and there is no direction as to distribution on expiration of the trust, it is held that the heirs are entitled to an immediate distribution of all the property disposed of in trust, beyond the amount necessary to provide for the purposes specified. Hardy v. Sears, 120 Mass. 524, 541. We reach the conclusion, therefore, that the provision of the will by which testator attempted to create a trust in the executor is void for uncertainty, save as to the direction that the sum of $100 to be retained and expended by the executor in caring for and improving the last resting place of testator, and that the trial court was right in decreeing that the balance of the estate be paid over to the plaintiff as heir. It is contended for appellant that the court was without jurisdiction, for the reason that a court of equity has no authority to interfere with the administration of estates in probate. But this contention is without merit. No objection was made below to the form of the proceeding, and, if it should have been in probate instead of in equity, the proper steps should have been taken to transfer the case to the probate docket. Easton v. Somerville, 111 Iowa, 164, 82 N. W. Rep. 475, 82 Am. St. Rep. 502. We have no doubt, however, that the proceeding was properly brought in equity. The trust created by the will being invalid, the executor holds the property "upon a resulting trust for those entitled under the statute of distributions; and thereby the jurisdiction to bring an equitable action for construction, and to have the resulting trust declared by the court, attaches as incident to the jurisdiction of equity over the trusts." Read v. Williams, 125 N. Y. 560, 26 N. E. Rep. 730, 21 Am. St. Rep. 748."

RIGHT OF COURT TO INTERFERE WITH THE DETERMINATION OF THE AMOUNT OF DAMAGES FIXED BY A JURY.

Lawyers are not infrequently heard to complain that there is a growing tendency on the part of the courts to usurp the functions of the jury in the award of damages in that class of cases in which there are no fixed rules by which the amount of damages may be determined, and in which, for that reason, if no other, the assessment of damages is peculiarly the province of a jury. There is no disposition to criticise the judiciary for its interference with the verdicts of juries in cases where the law affords a rule by which the damages may be measured and determined. But there are many instances where there are no such rules,—cases of pain and suffering, humiliation and loss of reputation. The criticism of the courts relates to their disposition to invade the province of the jury in this class of cases and to arrogantly assume omniscience respecting the extent of the injury. It is elementary that questions of law are for the court, and that questions of fact are for the jury; and the right of trial by jury has been attempted to be preserved by constitutional enactment.

As has been said, the award of damages is peculiarly the province of the jury in that class of cases in which no rule exists for their exact measurement; for, obviously, in the absence of such a rule, the court can no more certainly determine the extent of the injury than can an intelligent jury. But the courts have engrafted upon that doctrine the further principle that judges may set aside verdicts in such cases whenever the damages allowed are so excessive or inadequate as to create the belief that the jury was misled by prejudice; or that the verdict is the "result of improper motives;" or bears the "marks of passion, prejudice or corruption;" "or is palpably against evidence." All of these expressions are very familiar to the legal profession. By the application of one or more of these "principles," if the court and jury disagree as to the proper allowance, and it appears to the court to be too large, it is "excessive." Are not these tests however, when carefully analyzed and considered, merely convenient excuses, arbitrarily applied by the courts, to place their opinions on a higher plane than mere differences of opinion? For, after all is said, is the most learned and eminent jurist better able to gauge human pain and suffering than any intelligent, upright and thoughtful citizen,—butcher, baker or candle-stick maker,—of which the average jury is composed? Is it not quite probable that such a jury can even better understand, appreciate and estimate the nature and extent of such *damnum* than the average judge of appellate courts, however learned in law and nicely able to

"Distinguish and divide

"A hair 'twixt south and southwest side,"

particularly as juries see and hear the witnesses, while courts (on appeal at least) gather their impressions from printed transcripts which often lose much by transposition?

But do courts even observe the limitations by which they are supposed to be hedged about when reviewing verdicts of juries? Have they not lost sight of the "principles" by which they may interfere with the award of juries? Consider the opinion of the Nebraska supreme court in a recent case,[1] which is but one of many of the same kind: "The principal injury received by defendant in error was the laceration of the right arm. His right hand is somewhat smaller than the left hand, and flexed at the wrist joint. The circulation is impaired, and he has now but slight, if any, use of that hand and arm. The arm also seemed smaller than its mate, and the muscles of the right hand are flabby and unnatural. It was shown by the testimony of a number of witnesses that the flexed condition of the hand was caused principally, perhaps, by the injury, the tendons being somewhat lacerated, some of them possibly severed. The withered condition of the hand and arm are shown to be caused by want of circulation and the lack of nervous energy. The injury being upon the inside of the wrist perhaps severed some of the arteries, injured the tendons and nerves, which has resulted in inactivity, or the failure to use the hand and arm. To this inactivity is traceable to a considerable degree the want of circulation; the flexed condition of the wrist and hand, as well as the withered or lessened condition of the hand and arm. While the injury was very painful, and is no doubt a source of great annoyance and pain, even at the present time, yet we think it sufficiently appears from the testimony of the physicians who testified in the case, that with proper use of the hand and arm they may be restored to a great extent, and the defendant in error relieved of what now appears to be a permanent injury and total loss of the use of the hand. It is the opinion of all members of the court, from a somewhat careful consideration of the case, that $3,000 would have been an ample recovery in the case. The judgment will therefore be reversed, unless defendant in error, within 30 days, remits the sum of $2,000 from the judgment and accepts a modified judgment for $3,000."

Where does it appear here that the jury was actuated or influenced by any "improper motive," or "passion," or any of those things which gives to the court the right of interference with their verdict? Is there any reference, either in terms or by implication, to anything of that kind? Rather does it not stand out so plainly that "he who runs may read" that the court considered the injuries very much as a tax assessor considers the advantages and disadvantages of a piece of property to determine its worth? Was not this for the jury to determine? And if the court substituted its opinion for that of the jury, was not the substitution an arrogant invasion of the jury's province, rather than a correction of the judgment within the acknowledged functions of the court? The jury there assessed the plaintiff's damages at $5,000, but "it is the opinion of all the members of the court" that $3,000 would have been adequate. Are the opinions of courts to control the opinions of juries, the constitutional triers of questions of fact? It would seem so. But why not be honest and admit that, differing in opinion, they arbitrarily exercise their power, and not attempt to justify their interference by a "principle" which does not exist. It would then possess, at least, the merit of honesty.

Let us consider some of the "prices" our courts have established for broken limbs and bodily injuries. And also let us consider in this connection some of the reasons for such judicial quotations. A New York court[2] says: "The best criterion is the average amount awarded for injuries of a like nature and extent." Is it meant by this the average amount awarded by juries, or the average amounts which have been allowed by the courts? If the latter we must respectfully dissent; for we believe that when the right of trial by jury was guaranteed by the different state constitutions it was not contemplated that the result of such trial, upon questions of fact, should be abortive. And if the former, why should it not be permitted counsel to show the jury what that average is?

The Supreme Court of Washington,[3] in reducing a verdict from $30,000 to $12,000,

[1] Village of Orleans v. Perry, 24 Neb. 831.

[2] Lockwood v. Twenty-Third St. Ry. Co., 7 N. Y. Supp. 663.

[3] Mitchell v. Tacoma Railway & Motor Co., 13 Wash. 560.

says it does so because of "that being the amount fixed by a former jury." Why the former rather than the latter, and why this regard for the one and disregard for the other? Does not this difference in the amounts of these verdicts confirm the whole contention that human minds will differ in these things?

Iowa and Minnesota (the courts of these states) agree that $4,000 is too much for a broken leg, and the Iowa court reduces the verdict to $2,500. As there is no legal measurement of damages for a broken leg is not this an arbitrary assessment of damages? An assumption of something like legislative functions by the judiciary? The inadequacy of verdicts has not appeared to call for the court's correction as much as their excessiveness. The Missouri court says that $100 for the compound fracture of a leg is not so grossly inadequate as to warrant a new trial on the ground that the jury was influenced by passion or prejudice.[4] It seems grossly inadequate as compared with many cases where verdicts have been set aside as excessive. Another court (a federal court this time) says that for a broken leg, a dislocated arm, an injured back, shoulder causing disability to do anything for two years, $10,000 is excessive, and reduces the verdict to $5,000. Compare this with cases (and there are many) where courts have refused to disturb verdicts for even larger amounts where the injuries were much less serious. Would any member of that court submit to those injuries for $10,000? Of course, that is not the criterion; but why not that as well as the "average amount awarded" or the "amount fixed by a former jury?"

The Supreme Court of Wisconsin, in Abbott v. Tolliver, 71 Wis. 64, says that in an action for personal injuries to a woman the jury may consider that she is a woman of unchaste character. Is the moral character of litigants to be balanced in the scales of Justice in determining the extent of physical suffering? And shall the court, or the jury, measure the extent of the plaintiff's moral obliquity?

A New York court sustains a verdict of $25,000 for the loss of one leg by an infant.[5] Wisconsin holds that a verdict of $30,000 for injuries to a young boy, necessitating the amputation of both legs, is excessive.[6] An Arizona court holds that $15,000 is not too much for two legs,[7] while a verdict for $18,000 recovered in Illinois, for the loss of two legs, is set aside as excessive.[8] Then rub your eyes and look at this: In 1893 the the Supreme Court of Kentucky held that a verdict for $5,000 for the loss of two fingers was excessive,[9] while in 1896 the same court held that a verdict of $6,750 for the loss of two fingers was not excessive.[10] Quite an increase in the value of fingers in three years!

The reports contain thousands of cases in which courts have passed upon the question of damages in this class of actions, and an examination of but a few of them can leave no doubt that they have not been governed by any rule, but, on the contrary, are convincing that it is merely a matter of opinion wherein courts are no more likely to be right or certain than juries.

Every lawyer knows and appreciates the willingness of courts to review and alter the award of damages by juries, which doubtless accounts for the fact that, on the defendant's appeal, nearly every brief presented to the appellate courts in this class of cases contains among the "Assignments of Error" the one, and generally final claim, that "the verdict is excessive," which is argued before the court with the same eloquence and insistence that the same branch of the case was urged upon the jury upon the trial.

Undoubtedly, juries frequently return verdicts for excessive amounts, but neither are courts infallible, and they too sometimes permit exorbitant recoveries, although it must be confessed that their tendency is toward a reduction in most cases; and perhaps properly enough, if it be conceded that it is within the province of courts to assess the damages in such cases, or interfere with the assessment of the jury. But the contention here is that, within the constitutional provis-

[4] Dowd v. Westinghouse Air Brake Co., 132 Mo. 579.

[5] Ehrmann v. Brooklyn City R. Co., 14 N. Y. Supp. 336.

[6] Heddles v. C. & N. W. Ry. Co., 74 Wis. 239.

[7] Hobson v. N. M. & A. Ry. Co., 11 Pac. Rep. 545.

[8] C. & N. W. Ry. Co. v. Jackson, 55 Ill. 492.

[9] Louisville & N. R. Co. v. Foley, 21 S. W. Rep. 866.

[10] Louisville Water Co. v. Upton, 36 S. W. Rep. 520

ions, it is not. Courts have been doing this however for many years, and probably always will, and it is not expected that this commentary will change the practice. The time may come though when some court will have to acknowledge that it is nothing more than an exercise of arbitrary authority. Suppose an action for death by negligence. In many states there is no limitation of the amount which may be recovered in such cases. The measure of recovery, aside from any statutory limitation, briefly stated, is what the deceased would have earned during his life, his natural expectation of life being determined by mortality tables. Now, in this age when "captains of industry" are earning $100,000 a year, in an action for the death of one who, under the established rules of evidence, as certain as those applicable to a day laborer or railroad engineer, would have earned during his life $1,000,000, will any court uphold a verdict for that amount even though it be supported by the evidence, in all respects competent and proper?

If there should be a restraint placed upon juries (and perhaps there should be); if bodily injuries—broken heads and broken hearts—should be salved according to an established schedule, would it not be more satisfactory, more accurate, more consistent and more respectful of the constitutional provision that "the right of trial by jury shall remain inviolate" if it were left to the legislative branch of government to impose such restraint by prescribing limitations where it is considered necessary; to the courts the questions of law involved, and to the jury all questions of fact, subject to such legal limitations as may be imposed?

FREDERICK A. TEALL.

Eau Claire, Wis.

JUVENILE COURT—CHANCERY CONTROLLING MINORS.

PEOPLE v. IVIS.

Circuit Court of Cook County.

Chancery has complete jurisdiction in regard to the custody of minors within the state, and whenever a parent fails or whenever the child requires this fostering care of the state it may be exercised by a court of chancery, and such an exercise is not an imprisonment even if it results in the physical detention of the child or the control of the freedom of its movements so far as going elsewhere is concerned.

MCEWEN, J.: This is a petition on the relation of Tillie Ivis against Ophelia L. Amigh, superintendent of the state training school for girls at Geneva, for a writ of *habeas corpus*, heard upon the petition and the return of the writ.

The facts concerning the commitment as disclosed by the petition and return, which are substantially without dispute, show that a complaint, or a document in the nature of a complaint, was filed before Judge Mack as an examining magistrate, June 1, A. D. 1905, wherein the charge made against the relatrix was the violation of section 55 of chapter 38 of the revised statutes of the state of Illinois.

Upon this complaint a warrant issued under the order of Judge Mack of the juvenile court, and the relatrix was brought before the court. In connection with this proceeding, on June 1st, there was filed a petition setting forth that the relatrix was fifteen years of age; certain facts regarding her family, and charges that she has been reported several times within the past year as being incorrigible; besides, she has loose associates or vicious company, remains away from home late nights, and has a bad reputation in the neighborhood.

Upon relatrix being brought before the court, a hearing was had before the court and a jury of six jurors, who, upon the evidence, returned a verdict finding that all of the allegations of the petition are true; that the girl is between the ages of ten and eighteen years, and is of about the age of fifteen years; thereupon the circuit court entered final sentence upon the verdict committing the relatrix to the custody of the respondent in this case, reciting in the judgment of commitment that the relatrix had been charged with a violation of section 55, chapter 38, of the revised statute, before Julian W. Mack, judge of the circuit court of Cook county, etc., and committing relatrix to the school in question until she arrives at the age of twenty-one years, or until sooner discharged therefrom according to law.

The only issue of fact that seems to exist on the face of the papers is whether the institution at Geneva is a place of imprisonment, or whether it is a school; but I take it that the facts could not constitute a real issue because the fact of whether or not the detention of a girl at Geneva constitutes imprisonment is quite as much a matter of law upon the admitted facts, as the question of the actual incarceration or detention.

It is contended for the relatrix that the proceedings before Judge Mack in the circuit court were without jurisdiction; that the complaint charging relatrix was not specific and did not specify an offense, and that this complaint was an essential to jurisdiction, and not being sufficient, all subsequent proceedings were void and of no effect. Counsel for relatrix further says that even if the commitment is valid, still upon a *habeas corpus* proceeding, it is the province of the court to enter into an inquiry as to the fitness of

the parents to care for the child, and to treat the subject of the detention at Geneva as an original question. There are some minor questions running along with these as the main features of the case.

The case presents a matter of very grave importance as it raises some questions of practice and procedure, and jurisdiction of the circuit court in its juvenile branch in the matter of the control and custody of children. It presents questions of whether the child must be convicted of a crime before the court can act; whether the parents must be adjudged to be unfit, to invoke its jurisdiction; whether an issue can be presented between the parents as the natural guardians of the child; whether it is a matter of incompetency, neglect of the parent, or vicious tendencies in the child, and whether the state has a superior right to that of the parent, everything else being equal.

Historically considered, from the earliest days, the sovereign power of the state always assumed to have the right to the disposition of the destiny of the child and the subject; this control extended to the care of its estate and the management of the person of the child; it was of an absolute character; with the growth of law and constitution, however, this absolute right beginning with the power of life and death of the sovereign over the subject, has been limited, denied, and under present conditions of the juvenile courts of this day and the tendency of modern effort to reform the child, there are presented questions that seem never to have arisen in past days.

The strongest case relied upon by the counsel for the relatrix is the case cited in the fifty-fifth Illinois, page 280, The People *ex rel.* Michael O'Connell v. Robert Turner, superintendent of the reform school of the city of Chicago, in which the supreme court of this state declared that the parent has the natural right to the care and custody of his child, and this right should not be abridged by the state except from a necessity arising from gross misconduct or almost total unfitness on the part of the parent.

In that case the relator sought to be discharged from confinement in the old reform school of the city of Chicago because he had not been convicted, or charged with any crime, and had been committed apparently on general principles. The court say: "The warrant of commitment does not indicate that the arrest was made for a criminal offense, hence we conclude it was issued under the general grant of power to arrest and confine for misfortune."

The supreme court, with considerable expression of indignation, in holding the act under which the proceedings were had, unconstitutional, say: "Before any abridgement of the right of the parent, gross misconduct or almost total unfitness on the part of the parent must be clearly proved. This power is an emanation from God, and every attempt to infringe upon it except from dire necessity, should be resisted in all well-governed states. In this country the hope of the child in respect to its education and future advancement, is mainly dependent upon the father; for this he struggles and toils through life, the desire of its acomplishment operating as one of the most powerful incentives to industry and thrift; the violent abruption of this relation would not only tend to wither these motives to action but necessarily in time alienate the father's natural affection."

The Supreme Court, in the case of County of McLean v. Humphreys, 104 Ill., page 383, say: "It is the unquestioned right and imperative duty of every enlightened government in its character of *parens patriæ*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise." And in deciding this case, which was a case involving a commitment to the industrial school for girls at South Evanston, and the constitutionality of the act under which the commitment was made, the court further say: "It would be difficult to conceive of a class of persons that more imperatively demands the interposition of the state in their behalf than those we have just enumerated, and for whose benefit the act under consideration was adopted, and it would be a sad commentary on our state government if it is true, as is contended, there is no constitutional power in the legislature to provide, by suitable legislation, for the education, control and protection."

Ball v. McLain, 54 Ga. 159; People v. N. Y. Cath. Protectory, 38 Hun, 127; Com. v. St. J. Orp. Asylum, 9 Phila. 571; Farnham v. Pierce, 141 Mass. 203; *In re* Ferrier, 42 Am. Rep. 10, 103 Ill. 367; Mil. Ind. S. v. Sup. Milw. Co., 40 Wis. 382; *Ex parte* Crouse, 4 Whart. 9.

"In these cases it is said in substance such statutes are not penal and the commitment is not in the nature of punishment. Such an institution is a house of refuge: a school, not a prison. The object is the upbuilding of the inmate by industrial training, by education, and instilling principles of morality and religion, and above all by separating them from the corrupting influences of improper associates. In this case it clearly appears that the mother and grandmother of this girl are both of ill repute, that they are now living in disreputable localities, and the girl, if restored to them, or either of them, will be subjected to and surrounded by evil associates and corrupting influences. Ordinarily the parent is entitled to the custody, companionship, and care of the child and should not be deprived except by due process of law. It is a natural right, but not an inalienable one. The parents are trusted with the custody of the child upon the idea that under the instincts of parental devotion

it is best for the child. But when it clearly appears that it is not for the welfare of the state or the child that it should be taken from such an institution, the court will not so direct, but will leave the child where its safety, purity, and well-being requires; and this without regard to the informalities of its commitment, the court for the time being acting as its custodian."

While these cases, this one especially, goes further perhaps than our own, still with regard to the decision that this school is not a place of imprisonment it seems to be in accord with our own decisions. As a matter of fact, any detention or interference with the freedom of personal movement of another is an imprisonment, and is so considered in cases involving the question of false imprisonment; but in a case where there is a right to restrict, such as the right of a parent over his child, and such as the right of the state over the children which are properly subject to its jurisdiction, such detention or restraint is not imprisonment, although it may take on the character of imprisonment, but it is not penal in any sense, and in the meaning of the cases reported is not considered as being imprisonment.

The supreme court in the 139th Indiana Reports, page 268, 31 L. R. A. 740, announces the power of the Circuit Court of Chancery over children in the following language: "The circuit court was a court of general jurisdiction. If it was not clothed with all the jurisdiction of the English Court of Chancery, it is within a branch of the equity powers of the circuit courts of this state, that they have the superintendence of infants, idiots and lunatics. McCord Exr. v. Ochiltree, 8 Blackf. 15.

The power to appoint guardians for infants, idiots and lunatics, conferred by the statute, is merely declaratory of the power they already possessed. (Citing eight Indiana cases).

"We therefore hold that the circuit court had ample power to deal with and adjudicate upon the subject of the guardianship, custody and control of minors. The circuit court therefore had jurisdiction of the subject." Then they go on to discuss the question of notice to minors.

Our own supreme court, in the 103d Illinois, page 371, refers to this power, and in connection with the question there, of a commitment to the industrial school, in the following language:

"The power conferred under the act in question upon the county court is but of the same character of the jurisdiction exercised by the court of chancery over the persons and property of infants, having foundation in the prerogative of the crown, flowing from its general power and duty, as *parens patriæ*, to protect those who have no other lawful protector. (2 Story's Eq. Jur., sec. 1333). That jurisdiction extends to the care and person of the infant so far as is necessary for his protection and education, and upon this ground that court interferes with the ordinary rights of parents in regard to the custody and care of their children; for although, in general, parents are intrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of and will be brought up with a due education. But whenever this presumption is removed, and the parent is grossly unfit, and fails in this respect, the court of chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian and to take care of them, and to superintend their education. (*Ibid.*, sec. 1341)."

I take it that upon this record the circuit court had jurisdiction of the subject-matter, and of the person; that there was a charge made in the petition which I have already referred to, upon which charge a finding was made by the jury and confirmed by the sentence of the court, and which I am bound to conclude was a fact, namely, that she frequents the company of vicious persons, and remains away from home late at nights, and cannot be controlled by her parents. Now, if we say that is a fact—and for the purpose of this proceeding I think it is competent as a fact—then the next conclusion which follows is, that the parents failed, whether willfully, or whether they lacked the control, the parents failed in the matter of control, failed to keep her at home nights, and keep her out of vicious company, and keep her under the necessary discipline that a parent should exercise. If we say that is a fact, then in view of all the decisions, it is the duty of the state, not merely the right, but the duty that is imposed upon government, to care for the child, and the proceedings were under a statute enacted to fulfill that duty which rests on all civilized governments, and which was recognized by the legislature when it enacted a law establishing a home for girls, an industrial training schools for girls, a procedure under which neglected or vicious or delinquent girls might be brought into that home. * * *

The court apparently considered the reform school of the city of Chicago a place of imprisonment. A place where there were cells and iron bars where the relator was confined, and that the relator was not guilty of any offense and was committed, as the court says, "for misfortune."

In the case at bar, you might say in a general way, the other cases cited by counsel for relatrix are mainly along the line of the questions arising upon the commitment of children where there is no criminality on the part of the child.

Taking up the first question presented here, as to whether the complaint was sufficient, we encounter at the outset the question, "What is the nature of the proceeding in the circuit court in the juvenile branch thereof?" The circuit court of Cook county has general and unlimited criminal jurisdiction; it has jurisdiction to the same extent in all chancery matters. The statute under which this proceeding is had, seems to contemplate a double sort of action; first, there should be a charging of the defendant in that

court with some offense; next there should be some petition filed or representation made to the court, and the issue seems to be made up upon the petition rather than upon the complaint.

Now, Section 17 of the chapter on Charities, Hurd's Statutes, 1903, p. 272, says: "Whenever any girl between the ages of ten and eighteen years is charged with or found guilty of the violation of any statute, law or city ordinance before any justice of the peace, police magistrate, examining magistrate or court, if any credible person, a resident of the county, shall file a petition in any court of record in such county, setting forth the offenses charged, and that such girl is a vagrant or without a proper home or means of subsistence, or lives with or frequents the company of reputed thieves or other vicious persons, or is or has been in a house of ill fame, prison or poorhouse, or setting forth and showing any other facts of a similar nature, showing that it will be for the interest of such girl and the public that she should be sent to said state home for juvenile female offenders, the court may, etc., impanel a jury of six competent persons and if the jury shall return their verdict that the facts set forth in the petition are proved, the court may commit such girl to said state home for juvenile offenders, for a term not less than one year nor beyond the age of twenty-one years." "For purposes of convenience, the said reformatory may in all legal proceedings, contracts and papers of every kind, be designated as a 'state training school for girls,' and such designation shall be taken and held to have the same legal effect as if the name 'state home for juvenile female offenders' were used therein." So that the process upon which the defendant is brought before the court is criminal in its character, the petition and the trial by jury is of course civil, and the power of the judge seems to partake of the nature of a chancery power. The procedure is like some other proceeding, which we have, such as *quasi*-criminal cases, where the form of the procedure is criminal, but where the proceeding itself is held to be civil. Another illustration is cases of procedure under the Burnt Record Act, where the procedure is in the form of a chancery proceeding, but where the supreme court has held that the proceeding itself is a law proceeding. So that we have procedure in this state which may partake of one character, while the proceeding itself may be of another character.

I take it that the issue which is presented to the jury, being the issue upon the petition of this credible person, who is a resident of the county, and the verdict of the jury being directed to that, that the real issue before the court is the question upon the petition, and not necessarily the question upon the charge.

The cases which counsel for relatrix cite upon the sufficiency of this complaint here, are cases which would have a great deal of force with this court if the proceeding itself was directed to the complaint, if the statute providing the procedure did not permit the general allegation which is made in this affidavit of complaint. This affidavit of complaint considered by itself, considered as a basis for a prosecution, if there were nothing further in the way of a petition, or proceedings upon the petition, and nothing in the statute I would say that clearly it would be a bad complaint and might be assailed upon *habeas corpus* proceedings; but the statute does not seem to require that particularity which would be required if there was going to be a trial upon the question of a violation of the statute. The statute reads: "Whenever any girl, etc., is charged with or found guilty of the violation of any statute," etc.; it says to start this proceeding in operation the girl may be charged with the violation of the statute, and this complaint follows the language of the statute, that the child has violated Section 55, which is the statute on disorderly conduct, so that I think in this proceeding, that, being merely preliminary, being in the language of the statute, being the means of bringing the child before the court, of issuing the warrant and bringing the child before the court, and starting in motion the machinery of the court, I do not think it can be attacked at this time on *habeas corpus*, so that we come to the next question, as to what the power of this court is, or its jurisdiction to proceed upon the record in this case to a hearing as to the fitness of the parent.

I have considered these various cases and the question involved, seriously, as I recognize that the state of Illinois is in the advance, practically, of other states in this union in the matter of child-saving work, and there are great numbers of the best men and women of this state who are working along the lines for the advancement and interests of the children. I know there is a present sentiment or disposition to treat children with more consideration than they have been treated in the past in an endeavor to bring out of the child the qualities of good citizenship which will be of use to the community, and which will prevent them from becoming charges upon the community in the way of pauperism, degeneracy and crime.

I think that the question of the custody of the child in a case of this kind is a little broader than the mere question of the right of the parent as against the state. I am prepared to concede that, everything being equal, the parent has the right to the custody of the child; that the state has no arbitrary right of taking the possession of the person of the child and saying through its agent that the course of the life of the child shall be thus and so; the question is wider than the mere question of abstract right to the possession of the child, or abstract right in the child. Of course, the father has always been considered as having a species of property in his child; in the earliest days, when he had the power of life and death, the power of disposition of his person, down to the present time, when the father has the right to the custody of the child, and a right to its

wages, where the parent is limited in regard to the treatment of his child. There is one feature of the jurisdiction of the circuit court in regard to children that seems to me has been ignored a great deal in the discussion as to the right of the court, and that is the general chancery jurisdiction that has been exercised from time immemorial and represents the supreme power of the state to care for and protect and further the interests of its minor subjects; and it seems to me that, considering the character of the proceedings in the juvenile court. that that proceeding, where it comes under this statute, is in reality a chancery proceeding and is the exercise of the jurisdiction of that court as a chancellor. We can find many declarations regarding the power of the state exercised through its court of chancery.

While I started on the consideration of this case with some misgivings as to the extent of the power exercised by the juvenile court in this and in other cases, as I have looked into it, I have become satisfied that the chancery powers of the circuit court in the matter of the custody of delinquent children are almost supreme and sovereign powers, and that when there has been an adjudication in the manner provided for by law finding a person delinquent and judgment upon it, a commitment upon the judgment becomes of such a character as that a writ of *habeas corpus* does not permit the taking of that child out of a charitable institution, the purpose of which is the reformation and not the punishment of the child. So I shall order that the relatrix be remanded to the custody of Miss Amigh, and that is the order which will be entered.

NOTE.—The above opinion upholds every contention we made in our editorial, Vol. 61, p. 101. It seems impossible to believe that a court could hold otherwise in view of the equities. Public policy demands that these courts should be recognized as a part of the equity jurisprudence provided for by the state constitution. The mere fact that the legislature has made certain enactments providing for juvenile courts cannot reasonably be regarded as taking away the true character of the act. The legislative enactments relating to divorce proceedings do not change the fact that an action for divorce is one in equity. This same opinion has been held by the Hon. Ben Lindsey, judge of the juvenile court of Denver, Colorado, who is the father of the plan now being adopted in some of the states, notably Illinois and Utah. They are practically the laws of Colorado, which are the result of the experience of Judge Lindsey. Judge Lindsey's accomplishments have opened the door not only to the best means of dealing with juvenile delinquents, but also show the means of preventing so much crime, which has become so alarmingly on the increase all over our land. In these accomplishments Judge Lindsey has done a world of good for humanity. A greater service than that by Judge Lindsey has not been rendered in many years. What he has done is but earnest of what such a man may do if the opportunity is given him. We sincerely hope that the very able opinion by Judge McEwen, above set forth, may be read all over the land, and that the Supreme Court of Utah, which is soon to pass on the questions which are considered by Judge McEwen, may follow his opinion. Judge Lindsey's experience shows how important it is that the juvenile class of delinquents be kept from the class of confirmed criminals. It shows that the "disease of crime" may be checked under proper environments. It is not impossible that in time this disease may be practically cured. It is certain that no way has been presented which gives so much promise of ultimate success as that which Judge Lindsey fathers. It is worth the consideration not only of every state but the nation.

JETSAM AND FLOTSAM.

MR. JUSTICE DARLING'S HUMOR.

To be strictly fair (says the *Birmingham Post*) it must be said that some of the jokes which Mr. Justice Darling perpetrates during the trials over which he presides are "rather thin." But they are always welcome. When his lordship comes to Birmingham for the assizes he usually presides over the Nisi Prius court, in which the bulk of the proceedings are of the dreariest character. It is when such cases are being heard that Mr. Justice Darling becomes—like certain famous pens—a boon and a blessing. Just at the moment when the whole court is on the point of "lapping oblivion" Mr. Justice Darling comes to the rescue. He seizes on, say, a little slip by either counsel or witness, and without further ado the joke is cracked, and the court wakes up in a refreshing ripple of laughter.

A case was lately heard at the Birmingham assizes which was dry enough in all truth. A manufacturing firm were being sued by a late employee for damages for wrongful dismissal. Mr. Justice Darling was responsible for the only laugh heard during the progress of a two days' hearing. Turning to the report of the case we find that counsel was proceeding to refer to the question of lead poisoning. With an expression on his face of intense innocence, his lordship asked, recalling the days when he used to be known as "Deptford's Darling," "I used to hear people in the house of commons talking about 'phossy jaw;' is that the same thing?" Counsel hastened to assure his lordship that it was not the same thing. "Phossy jaw" had to do with matchmaking—what he was referring to was "lead poisoning." Then his lordship, with a faraway look in his eyes, as though he were "looking down time's dim avenues upon a fast-fading past," remarked quietly, "Well, I know I used to wish they had 'phossy jaw.'" The members of the bar laughed cordially, everybody in court joined in, and to that extent the court was relieved.

In another case heard at the assizes, a Midland company sued a firm of manufacturers for damages for wrongful appropriation of water. In this case two witnesses were called who certainly gave his lordship little chance of scoring a joke. Their characteristic dialect, combined with a particularly blunt and unabashed way of answering questions—whether put by judge or counsel on either side—kept the court in great good humor. During the course of the hearing it was sought to prove an allegation that an employee of the water company had offered a witness liquid refreshment in view of the possibility of his giving evidence. The witness referred to was in the box, and admitted that there had been a meeting in a house "within the meaning of the Act," so to speak. As he proceeded, his lordship remarked that he gathered that the inspector had the whisky and the witness the water. Witness replied with some asperity that

"someone else had the water." This provoked a roar; and he at once proceeded to explain that he had "stood his round."

Sometimes his lordship will quietly "get at" a witness, and cause him to trip. Thus, in a case in which the question of whether a certain amount had been paid over as a bribe or as commission was being inquired into, a witness admitted having received a sum from another gentleman, but on being asked the date, he said it had escaped his memory, and when asked what it (the money) was given for, he replied "Nothing." This led his lordship to inquire, with a sly twinkle in his eye, if the occasion upon which he received the money was his "birthday." The reply of the witness was that he spent a month's holiday at the sea. Then the judge's mobile features became stern, and he said to the witness: "I do not propose to ask you any more questions; I will leave counsel to cross-examine you."

A case was being tried in which a Midland member of parliament sued a gentleman, who differs from him widely in politics, for libel. In the course of an extraordinary letter to the plaintiff, the defendant used the words: "You have been most noble in your generosity to your own widows," and his lordship's sharp interjection of "Whatever does the man mean?" caused a hearty outburst of laughter, and when counsel, who was reading the letter, proceeded, "whose husbands have been killed in your employ," the absurdity of the wording was too much for his lordship, and he had to join in.

With Mr. Justice Darling, as with many other humorists, it is not always what he says that draws forth the laugh: it is the way he says it. Thus, in the case we have just referred to, the member of parliament was bound to confess that since he entered the house he had become used to the "rough and tumble of verbal disputes," and he further admitted that he had, on occasion, heard "strong language" used. His lordship simulated pained and shocked surprise, and asked the witness impressively, "Do you mean in the house of commons?" and the M. P.'s affirmative was drowned in the laughter which followed the question.

CORRESPONDENCE.

NEGLIGENCE OF PARENT NOT IMPUTED TO CHILD IN MINNESOTA.

Editor of the Central Law Journal:

In your issue of September 29, Mr. Sumner Kenner, in the Leading Article, quotes from the case of Fitzgerald v. St. P., M. & M. Ry. Co., in which the Supreme Court of this state (Minnesota) held, in accordance with the "New York rule," that the negligence of the parent or custodian of a child, *non sui juris*, was in law the negligence of the child. I wish to call attention to the fact that this case has been recently overruled by our supreme court. Mattson v. Minn. & N. W. R. Co., 104 N. W. Rep. 443.

Yours truly,

Little Falls, Minn. A. P. BLANCHARD.

HUMOR OF THE LAW.

The name of Senator Sniffkins came afar down the list, and the voice of the clerk intoning the roll call made an excellent soporific.

Senator Sniffkins was very tired. He nodded and drowsed.

"Senator Shugar," finally droaned the clerk.

"Present."

"Seantor Slye."

"Present."

"Senator Sniffkins."

That gentleman emitted a half-snore.

"Senator Sniffkins."

Senator Sniffkins roused himself and stared about him with the vacuous stare of interrupted slumber.

"Senator Sniffkins!" called the clerk for the third time.

Senator Sniffkins evidently realized what was wanted now.

Sitting up in his seat, he shouted, firmly, "Not guilty!"

He came puffing into the lawyer's office, says the Chicago *Tribune*, and laid down a card on the desk before the eminent attorney, who glanced at it.

HAPPY HOME LIFE INSURANCE COMPANY.
Represented by
T. Anderson Allin.

"Well, now Mr. Allin," began the attorney quickly, "I may as well say in the beginning that there is no—"

"Just a minute, please," broke in the insurance solicitor, "I haven't the least idea in the world of—"

"Yes, I know, but my time is valuable, and so is yours, and I may as well be frank with you in—"

"But, my dear sir, you don't understand me."

"It wouldn't make a bit of difference if I did. I say that I don't want any—"

"If you'll just wait half a minute and allow me to—"

"But I haven't got half a minute to spare. I'm a busy man, and I'm carrying now all the—"

"But, my dear sir," burst out the insurance man, jumping to his feet and striking the desk with his umbrella. "I didn't come up here to talk insurance to you. My company isn't taking risks on waterlogged hulks like you, sir. I came up here with the idea of employing you to act as counsel for my company in a case involving $200,000. But sir, after you have so grossly insulted me, sir, I'd see you in Tophet before I'd pay you a retaining fee."

And the caller stalked out of the attorney's office, slamming the door behind him.

Dean Bennett, of the Boston University law school, as is well known, has been connected with that institution of learning for many years, succeeding his father, the late Judge Bennett, in the executive office of the university. The dean is not prone to relate many of the exceptionally humorous anecdotes that have come under his observation, but the following slipped by at a recent dinner party:

"It was during a quiz on intent in larceny," related the dean, "and one lawyer in embryo who meant well, but didn't know (yet what he didn't know he was not at all afraid to ask about), was interested in the theoretical problems presented in an instance in which a man stole a cow.

"'Now, professor,' he ventured, 'suppose this man went into this barn intending to steal a black cow, and in the dark took a white one by mistake, would that be larceny?'

"I had to remark," concluded Mr. Bennett, "that the 14th amendment had a good deal to do with wiping out the color line."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE — Employer's Liability Contract.—Where an indemnity insurance company did not defend the policy against insured, it is liable for the costs of that action, in an action on the policy.—Traveler's Ins. Co. v. Henderson Cotton Mills, Ky., 85 S. W. Rep. 1090.

2. ACTION—Collision of Trains at Crossing.—The complaint in an action by one railroad company against another to recover one-half the damages resulting from a collision at a crossing considered, and held to contain two causes of action on contract which could be joined under Rev. St. 1899, § 593.—Southwest Missouri Electric Ry. Co. v. Missouri Pac. Ry. Co., Mo., 85 S. W. Rep. 968.

3. ACTION—Equitable Estoppel.—An injunction would not lie to restrain an action at law involving title to chattels merely because one of the parties predicated his rights on an equitable estoppel.—Kronson v. Lipschitz, N. J., 60 Atl. Rep. 819.

4. ACKNOWLEDGMENT — Effect of Failure to Follow Statutory Requirements.—Dereliction of notary in taking acknowledgment of a married woman held not to affect the grantee.—Johnson v. Callaway, Tex., 87 S. W. Rep. 178.

5. AGRICULTURE—Money Had and Received.—In an action to recover proceeds of lien cotton after notice, plaintiff could only require defendant to account for the money received from the crop under lien.—Rose v. Florence Harness Co., S. Car., 50 S. E. Rep. 556.

6. APPEAL AND ERROR—Action for Broker's Commission.—In an action for broker's commissions, error of the court in limiting the cross-examination of the broker in relation to the purchaser's agreement to pay part of the commission held harmless.—Norman v. Hopper, Wash., 80 Pac. Rep. 551.

7. APPEAL AND ERROR—Law of the Case.—A statement in an opinion on a former appeal of an action for damages against a tenant held not to constitute a decision that the action was for waste.—Halstead v. Sigler, Ind., 74 N. E. Rep. 257.

8. ATTORNEY AND CLIENT—Usage and Custom.—An attorney is not, by virtue of that relation alone, liable for court fees accruing in suits brought by him, but may become responsible for such fees by custom.—Russell's Exx. v. Ferguson, Vt., 60 Atl. Rep. 802.

9. BAILMENT — Liability for Driving Sick Horse.—Though a horse hired became sick during the journey, it cannot be said as matter of law that it was negligent to drive the horse home.—Haralson v. Hahl, Tex., 85 S. W. Rep. 1008.

10. BANKRUPTCY—New Promise to Pay.—A promise to pay "as soon as possible" after a discharge in bankruptcy is not a conditional promise, and as such insufficient to support an action on the original demand.—Sundling v. Willey, S. Dak., 103 N. W. Rep. 88.

11. BANKRUPTCY—Review on Appeal.—Defendant, on appeal from order granting a new trial, cannot complain of the instructions, unless upon the whole case there was no theory on which he could recover.—Werthman v. Mason City & Ft. D. R. Co., Iowa, 103 N. W. Rep. 135.

12. BANKS AND BANKING—Actions.—Where a receiver of a bank has been appointed, an action cannot be maintained against him to recover a deposit; the remedy being by petition in the receivership action.—Crutchfield v. Hunter, N. Car., 50 S. E. Rep. 557.

13. BILLS AND NOTES—Attorney's Fees for Collecting.—Where the holder of a note had made no contract with his attorney for collecting it, he was only entitled to recover the reasonable value of his services, though note provided for 10 per cent. attorney's fees.—Texas Land & Loan Co. v. Robertson, Tex., 85 S. W. Rep. 1020.

14. BILLS AND NOTES—Discounting Bank a Bona Fide Purchaser.—A bank, by discounting a note for a depositor and crediting it to his deposit account, held not to become a *bona fide* purchaser.—City Deposit Bank Co. v. Green, Iowa, 103 N. W. Rep. 96.

15. BILLS AND NOTES—Limitations.—An indorser of a note held not estopped to set up the statute of limitations as a defense against the holder.—Munroe v. Herrington, Mo., 85 S. W. Rep. 1002.

16. BILLS AND NOTES—Misrepresentation of Payee.—In an action on a note, held, that defendant was not entitled to escape liability, though the amount of the note was other than it should have been, owing to false representations of the payee.—Daniel v. Learned, Mass., 74 N. E. Rep. 322.

17. BILLS AND NOTES—Right to Maintain Action on Note.—The holder of note by indorsement and delivery may sue thereon, irrespective of the interest of a third person in the note.—Barber v. Stroub, Mo., 85 S. W. Rep. 915.

18. BROKERS — Option Contract. — A broker having found purchasers for the assets of a corporation at the price specified, under an option contract, held entitled to commissions.—Norman v. Hopper, Wash., 80 Pac. Rep. 551.

19. BURGLARY—Evidence.—In a prosecution for burglary, if the evidence shows beyond a reasonable doubt that it was committed in the night time, it is sufficient.—Keeler v. State, Neb., 103 N. W. Rep. 64.

20. CARRIERS—Care Required in Carriage of Passengers—A carrier of passengers held only bound to exercise the highest degree of care "reasonably compatible with the practical operation of its business."—Denham v. Washington Water Power Co., Wash., 80 Pac. Rep. 546.

21. CARRIERS — Limiting Liability. — The corporation commission held to have no power to limit the liability of a carrier for loss of goods through its negligence to less than their value.—Everett v. Norfolk & S. R. Co., N. Car., 50 S. E. Rep. 557.

22. CHAMPERTY AND MAINTENANCE—Employee's Liability Insurance.—An insurance company, having indemnified an employer from liability for injuries to an employee, held not liable for maintenance in defending an action for such injuries.—Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co., Mo., 85 S. W. Rep. 930.

23. COMMERCE—Selling Liquor on Excursion Steamer.—The carrying of a pleasure party on a steamboat is not interstate commerce, although the boat may touch the shores of different states.—State v. Seagraves, Mo., 85 S. W. Rep. 925.

24. CONSTITUTIONAL LAW—Health Regulations.—Reasonable municipal health regulations under the authority of the state are not void as taking private property without due process of law or without just compensation.—State v. Robb, Me., 60 Atl. Rep. 874.

25. CONTRACTS—Franchise as to Privilege of Removing House Offal.—A municipal ordinance, giving exclusive

privilege of removing all house offal within the city to a person specially appointed, is not void as creating a monopoly.—State v. Robb, Me., 60 Atl. Rep. 874.

26. CORPORATIONS—Misapplication of Funds.—Treasurer of corporation held liable to it for moneys distributed to the stockholders.—Cheat Valley R. Co. v. Humes, Pa., 60 Atl. Rep. 908.

27. CORPORATIONS—Salary of President After Sale of Business.—Under a contract by which a corporation disposes of its entire business, the purchaser held not liable for the salary of the president of the corporation after the sale.—Busell Trimmer Co. v. Coburn, Mass., 74 N. E. Rep. 334.

28. COSTS—Failure to Give Security.—Failure to file security for costs is no ground for dismissal as against defendants who have answered.—Randolph v. Cottage Hospital of Des Moines, Iowa, 103 N. W. Rep. 157.

29. CRIMINAL LAW—Error by State.—The right of the state to prosecute error in a criminal case exists only by statute.—Mick v. State, Ohio, 74 N. E. Rep. 284.

30. CRIMINAL LAW—Right to Open and Close Argument.—Attorneys who act as prosecuting witnesses should not be permitted to open and close to the jury on behalf of the state.—State v. Price, Mo., 85 S. W. Rep. 922.

31. CRIMINAL TRIAL—Debating Admissibility of a Confession Before Jury.—In a criminal case, it was within the discretion of the court not to require the jury to withdraw during the preliminary hearing of the evidence on the question as to the admissibility of a confession.—State v. Stibbens, Mo., 87 S. W. Rep. 460.

32. CRIMINAL TRIAL—Declarations.—When the declarations of a party are given in evidence against him, all that he said upon the subject at the same time must be received and weighed.—State v. Bean, Vt., 60 Atl. Rep. 807.

33. CRIMINAL TRIAL—Former Jeopardy.—Where, on the second trial it is claimed that accused had been put in jeopardy, and the record discloses all the facts, they need not be pleaded anew or proved *aliunde*.—State v. White, Kan., 80 Pac. Rep. 589.

34. CRIMINAL TRIAL—Reasonable Doubt.—The accused is entitled to the benefit of any reasonable doubt of the proof of any of the material elements of the crime charged.—State v. Harrison, Del., 60 Atl. Rep. 866.

35. CRIMINAL TRIAL—Reopening Case.—The court may reopen the case and admit testimony by a witness who has been arrested for perjury on account of false swearing when on the witness stand for the state in its case in chief.—State v. Moon, Kan., 80 Pac. Rep. 597.

36. CRIMINAL TRIAL—Venue.—If it appears from the whole evidence beyond a reasonable doubt that the crime charged was committed in the county of the trial, the venue is sufficiently proved.—Keeler v. State, Neb., 104 N. W. Rep. 64.

37. DAMAGES—Abbreviation "Etc." in a Charge Enumerating Items.—The use of the abbreviation "etc." in a charge enumerating items of damage recoverable for personal injuries, is misleading and erroneous.—Lodwick Lumber Co. v. Taylor, Tex., 87 S. W. Rep. 358.

38. DEATH—Action by Father for Wrongful Death.—A father cannot maintain an action in his own right for damages on account of the negligent killing of his child.—Shaw v. City of Charleston, W. Va., 50 S. E. Rep. 527.

39. DEPOSITARIES—County Unlawfully Depositing with Bank.—A county held entitled to recover of a bank money unlawfully withdrawn from the county treasury by a supervisor and deposited with the bank, without judgment being had against the supervisor.—Harrison County v. State Sav. Bank, Iowa, 103 N. W. Rep. 121.

40. DIVORCE—Evidence When Not Contradicted.—Though the testimony of plaintiff in divorce is not directly contradicted, the court is not bound to accept the statements as true, if it has reason to doubt his good faith.—May v. May, Kan., 80 Pac. Rep. 567.

41. ELECTRICITY—Injury by Live Wire.—In an action ainst an electric company for injuries to plaintiff, who was burned by a live wire, held, that the question of plaintiff's contributory negligence was for the jury.—Linton v. Weymouth Light & Power Co., Mass., 74 N. E. Rep. 321.

42. EMINENT DOMAIN—Landlord and Tenant.—Where an award in condemnation proceedings was made to the owner, but not to his tenant, neither was bound to join the other in his appeal therefrom.—Simons v. Mason City & Ft. D. R. Co., Iowa, 103 N. W. Rep. 129.

43. EMINENT DOMAIN—Market Value.—The market value is the price for which the land could be sold by a person desirous of selling to a person willing to buy.—Guyandotte Valley Ry. Co. v. Buskirk, W. Va., 50 S. E. Rep. 521.

44. ESTOPPEL—Acceptance of Goods.—Purchasers of lumber held estopped, after acceptance without objection, from claiming damages on the ground that it was not in good condition.—Skidmore v. Scobee, Ky., 85 S. W. Rep. 1088.

45. ESTOPPEL—Suit to Quiet Title.—The state, in a suit to quiet title, may avail itself of irregularities in defendant's title under a tax deed, although such irregularities were committed by the state's agents and officers.—State v. Coughran, S. Dak., 103 N. W. Rep. 31.

46. EVIDENCE—Boundaries.—The acts of the owner of land, when pointing out the monuments and his boundaries, and his declarations when no controversy exists, are competent after his death.—Emmet v. Perry, Me., 60 Atl. Rep. 872.

47. EVIDENCE—Delay in Shipment of Live Stock.—In an action for damages to live stock by delay in transit, expert witnesses may testify what would constitute a reasonable time for the transit in question.—Texas & P. Ry. Co. v. Ellerd, Tex., 87 S. W. Rep. 362.

48. EVIDENCE—Opinion as to Value.—Witness to value of real property, after giving his opinion, may state the facts on which such opinion is based, although such facts involve constituent elements of value.—Neppach v. Oregon & C. R. Co., Oreg., 80 Pac. Rep. 482.

49. EVIDENCE—Suicide.—The presumption that a sane person will not take his own life must yield to proof of physical facts clearly inconsistent therewith.—Hardinger v. Modern Brotherhood of America, Neb., 103 N. W. Rep. 74.

50. EXECUTION—Teacher's Salary.—Salary due a teacher in city schools cannot be seized under execution.—Flood v. Libby, Wash., 80 Pac. Rep. 533.

51. EXECUTORS AND ADMINISTRATORS—Grounds for Removal.—The fact that an executor concealed will of his testator's widow held not to disqualify him as a matter of law from acting as executor.—McGuinness v. Hughes, Mass., 74 N. E. Rep. 317.

52. EXECUTORS AND ADMINISTRATORS—Necessity of Suing to Recover Personal Property.—Where intestate died seised of a claim for one-sixth of the value of a crop growing on certain real estate, it was the duty of her administrator to sue for and recover the same for the benefit of creditors and distributees.—Perkins v. Goddin, Mo., 85 S. W. Rep. 936.

53. EXECUTORS AND ADMINISTRATORS—Order of Payment of Estate Debts.—The order of payment of the debts of a decedent is fixed by contract or statute, and cannot be changed by an order for the issuance of receiver's certificates to pay certain claims.—Fisher v. Southern Loan & Trust Co., N. Car., 50 S. E. Rep. 592.

54. EXECUTORS AND ADMINISTRATORS—Right of Administrator to Sue.—Orders and decrees of county court in probate proceedings and letters of administration granted by it held conclusive of an administrator's right to sue.—Rogers v. Tompkins, Tex., 87 S. W. Rep. 379.

55. FIXTURES—Commercial Finishing Material.—Commercial finishing material, and not referred to in a deed of trust conveying a building in which it was to be used and in which it was stored, held, not fixtures passing to a purchaser on foreclosure.—Blue v. Gunn, Tenn., 87 S. W. Rep. 408.

56. FIXTURES—Equitable Interference.—A bill will lie to prevent interference with boilers in possession of lessee of building under contract of bailment, on his bankruptcy; there being no adequate remedy at law.—Wetherill v. Gallagher, Pa., 60 Atl. Rep. 905.

57. FIXTURES—Verbal Sale of Land.—A verbal sale of land does not convey title unless the vendee takes possession of the land and makes valuable and permanent improvements.—Keith v. Keith, Tex., 87 S. W. Rep. 384.

58. FRAUD—Sale of Land by Acreage.—In an action for deceit by a vendee on the ground that the sale had been made by acreage, and that the vendor had misrepresented it, evidence held to sustain verdict for plaintiff.—Leicher v. Keeney, Mo., 85 S. W. Rep. 920.

59. FRAUDS, STATUTE OF—Agreement to Answer for Debt of Another.—An agreement by highway contractors to liquidate an indebtedness of a subcontractor to relators for labor, supplies, etc., held a collateral undertaking, within the statute of frauds.—Miller v. State, Ind., 74 N. E. Rep. 260.

60. FRAUDS, STATUTE OF—Oral Contract Involving Real Estate.—Under oral contract for purchase of real and personal property, son held to become owner of note executed by himself to his father representing the purchase price.—Hasenbeck v. Hasenbeck, Mo., 85 S. W. Rep. 916.

61. FRAUDULENT CONVEYANCES—Conveyance to One for the Benefit of Another.—One may not protect his chattels from execution by causing them to be conveyed to to another in trust, at the time he buys them.—Kronson v. Lipschitz, N. J., 60 Atl. Rep. 819.

62. FRAUDULENT CONVEYANCES—Husband and Wife.—Deed to wife as purchaser on foreclosure against husband, and deed by her to third person, held not fraudulent as to creditors of husband.—Hesseltine v. Hodges, Mass., 74 N. E. Rep. 319.

63. FRAUDULENT CONVEYANCES—Limitations.—Statute of limitations does not begin to run against right of creditor to subject to the payment of his claim land purchased by his debtor and conveyed to the latter's wife in fraud of creditors until the recovery of judgment by such creditor.—Watt v. Morrow, S. Dak., 103 N. W. Rep. 45.

64. HABEAS CORPUS—Where Prisoner is Held Under Void Process.—*Habeas corpus* is the proper remedy when the process upon which a convict is held was issued by a court having no jurisdiction of the case or person at the time of its issue.—Tuttle v. Lang, Me., 60 Atl. Rep. 892.

65. HEALTH—County Superintendent.—A county superintendent of health cannot delegate the performance of his official duties, so as to give his employees the right to make their services a county charge.—Copple v. Commissioners of Davie County, N. Car., 50 S. E. Rep. 574.

66. HEALTH—Right to Collect House Offal.—An ordinance prohibiting the collection of house offal, except by duly authorized appointees, extends only to offal collected elsewhere than on the owner's premises, and is valid to that extent.—State v. Robb, Me., 60 Atl. Rep. 874.

67. HIGHWAYS—Law of Road.—It is not negligence as matter of law to drive on the left hand side of a street.—Wood v. Boston Elevated Ry. Co., Mass., 74 N. E. Rep. 298.

68. HIGHWAYS — Subject to Jurisdiction of County Courts.—County courts have exclusive jurisdiction of proceedings to open and change roads, and mere errors of procedure in ordering the closing of a road cannot be collaterally attacked.—State v. Miller, Mo., 85 S. W. Rep. 912.

69. HOMICIDE—Evidence.—As to intent of person who has shot another, proof that, had the bullet spent its force in the direction it was discharged, the result would probably have been such other's death, is competent.—Ullman v. State, Wis., 103 N. W. Rep. 6.

70. HUSBAND AND WIFE—Partnership.—A husband and wife may transact business as copartners, and there may be a subpartnership between them in reference to the profits of the business in which the husband is a partner.—Morrison v. Dickey, Ga., 50 S. E. Rep. 175.

71. HUSBAND AND WIFE—Wife as Agent.—It cannot be presumed that the husband was the authorized agent of his wife to sell sand from the latter's land to another.—Cox v. St. Louis, M. & S. E. Ry. Co., Mo., 85 S. W. Rep. 989.

72. INCEST—Uncorroborated Testimony.—Where defendant's daughter did not consent to the act of intercourse, defendant could be convicted of incest on her uncorroborated testimony.—State v. Rennick, Iowa, 103 N. W. Rep. 159.

73. INDICTMENT AND INFORMATION — Indictment. — Where an indictment contained a count charging rape on a girl under 15 years of age and one charging rape by force, threats, and fraud, it was within the province of the court to submit only the first count.—Ricks v. State, Tex., 87 S. W. Rep. 345.

74. INFANTS—Articles Purchased to Carry on Business.—Articles purchased by an infant for carrying on a trading business and services rendered him are not necessaries.—Wallace v. Leroy, W. Va., 50 S. E. Rep. 248.

75. INFANTS — Repudiation of Contract. — An infant could not repudiate his agreement to return certain goods in satisfaction of the balance of the price thereof, and recover the goods, without paying such balance.—Gordon v. Miller, Mo., 85 S. W. Rep. 948.

76. INFANTS—Submission to Arbitration.—A guardian *ad litem* or next friend of an infant cannot bind the infant by submission to arbitration, even though the submission be made a rule of court.—Millsaps v. Estes, N. Car., 50 S. E. Rep. 227.

77. INJUNCTION—Trespass.—A trespass is irreparable when it is impossible to make full reparation in damages, and that it would be difficult does not make the trespass irreparable.—Gray Lumber Co. v. Gaskin, Ga., 50 S. E. Rep. 164.

78. INTOXICATING LIQUORS — Interstate Shipment C. O. D.—An express company held not liable for an alleged unlawful sale of intoxicating liquors to plaintiff's husband, where the proof showed an interstate transportation of liquors to him C. O. D.—Chambers v. Adams Exp. Co., Iowa, 103 N. W. Rep. 152.

79. INTOXICATING LIQUORS—Local Option Law.—In a prosecution for violating the local option law, it was not error for the court to leave to the jury whether the sale of intoxicating liquors had been prohibited in the territory where the liquor, in fact, had been sold.—Adams v. State, Tex., 85 S. W. Rep. 1079.

80. INTOXICATING LIQUORS—Mulct Tax.—An action to recover a mulct tax is maintainable against the person conducting the business and the sureties on his bond.—Carroll County v. Ley, Iowa, 103 N. W. Rep. 101.

81. JUDGES—Brief Absence of Judge During Criminal Trial.—Absence of judge from courtroom during trial of felony case held, under the circumstances, not reversible error.—Scott v. State, Tex., 85 S. W. Rep. 1060.

82. JUDGMENT—Motion to Set Aside. — An irregular judgment can be set aside by a motion in the cause by a party thereto within a reasonable time after the term on a showing of merits.—Scott v. Mutual Reserve Fund Life Assn., N. Car., 50 S. E. Rep. 221.

83. JUDGMENT—Res Judicata in Action for Accounting.—A decree for defendant in a suit for an accounting of a trust fund held *res judicata* of a cause of action stated in a subsequent bill on a different ground, affecting the same parties, and praying the same relief.—Barnes v. Huntley, Mass., 74 N. E. Rep. 318.

84. JUDICIAL SALES—Ratification of Defective Sale.—If a purchaser at a judicial sale can legally claim that he was misled or deceived by some apparent adjudication of the court, and that it is inequitable to enforce his contract of purchase against him, he is entitled to relief.—Podesta v. Binns, N. J., 60 Atl. Rep. 815.

85. JURY—Challenge to Array.—How specific the ground of a challenge to the array should be made is within the

discretion of the court, provided they are so clearly stated as to reasonably inform the adverse party of the nature thereof.—Ullman v. State, Wis., 103 N. W. Rep. 6.

96. JURY—Waiver of Right to Jury.—The right to a trial by jury being a constitutional right, a waiver thereof will not be presumed.—Allworth v. Interstate Consol. Ry. Co., R. I., 60 Atl. Rep. 834.

97. LANDLORD AND TENANT—Caveat Emptor.—When a landlord leases a dwelling house to a tenant, there is no implied warranty that such dwelling house is reasonably fit for habitation, and no obligation to make repairs.—Bennett v. Sullivan, Me., 60 Atl. Rep. 886.

98. LANDLORD AND TENANT—Contract Respecting Operation of Farm.—Contract between owner of farm and another construed, and held, that the owner was required to furnish one-half of the stock for the farm, and not merely one-half of the working stock.—Green v. Hart, Ky., 87 S. W. Rep. 315.

99. LANDLORD AND TENANT—Defective Premises.—A person entering in his regular course of business a building in the control of a lessee for the purpose of delivering goods to a subtenant is lawfully on the premises and entitled to have the same reasonably safe.—Wright v. Perry, Mass., 74 N. E. Rep. 328.

90. LANDLORD AND TENANT—Injury to Tenant's Property.—In an action by a tenant against his landlord for injuries to property caused by rain being negligently allowed to flow into the demised portion of the premises, evidence held sufficient to sustain a verdict for $1,500.—Nahm & Friedman v. Register Newspaper Co., Ky., 87 S. W. Rep. 296.

91. LANDLORD AND TENANT—Lease.—An agreement between a landlord and his tenant from year to year, by which the covenants of an existing lease are to some extent modified, without a surrender or agreement to surrender, the existing tenancy held not to create a new term.—McCaw v. Cox, Neb., 103 N. W. Rep. 76.

92. LANDLORD AND TENANT—Personal Injuries Due to Defective Premises.—A child of a tenant stands in no better position to recover for personal injuries from defective premises than does the tenant.—Phelan v. Fitzpatrick, Mass., 74 N. E. Rep. 326.

93. LANDLORD AND TENANT—Wrongful Ejectment.—Where a lessee was ejected from the leased premises by the lessor, the latter was liable to the lessee for the reasonable rental value of the land for the unexpired period of the lease.—Campbell v. Howerton, Tex., 87 S. W. Rep. 370.

94. LIBEL AND SLANDER—Elements of Damage.—Mental suffering is an element of damage in an action for slander.—Finger v. Pollack, Mass., 74 N. E. Rep. 317.

95. LIBEL AND SLANDER—Reputation for Unchastity.—In prosecution for slander of female, defendant may avail himself of the female's bad reputation in the place from whence she came.—Ballew v. State, Tex., 85 S. W. Rep. 1063.

96. LIFE INSURANCE—Contract to Give Sisters Insurance Money.—A mutual promise between two brothers to pay the proceeds of an insurance policy to their sisters is based on a sufficient consideration, when followed by performance to his detriment by one of the parties.—Willoughby v. Willoughby, S. Car., 50 S. E. Rep 208.

97. LIMITATION—Pleadings.—A reply, when filed, relates back to the commencement of the action, and may be filed after the expiration of the limitation period, where the action is commenced within that period.—State v. Coughran, S. Dak., 103 N. W. Rep. 31.

98. MASTER AND SERVANT—Assumed Risks.—The knowledge of ordinary risk of servants is as binding on the servant as on the master.—Charping v. Toxaway Mills, S. Car., 50 S. E. Rep. 186.

99. MASTER AND SERVANT—Assumed Risk.—A railroad employee, while assuming the risks of the usual danger of his employment and of such dangers and risks as are obvious, does not assume those caused by negligence.—Ft. Worth & D. C. Ry. Co. v. Smith, Tex., 87 S. W. Rep. 371.

100. MASTER AND SERVANT—Assumed Risk.—Assumption of one risk by servant does not preclude a recovery for injuries resulting from other negligence of the master.—St. Louis Southwestern Ry. Co. of Texas v. Rea, Tex., 87 S. W. Rep. 324.

101. MASTER AND SERVANT—Breach of Contract for Services.—An employer who breaks the contract is liable only for the difference between the salary promised and what the employee could have earned in some other occupation.—Busell Trimmer Co. v. Coburn, Mass., 74 N. E. Rep. 334.

102. MASTER AND SERVANT—Complaint in Personal Injury Case.—Complaint for injuries to servant held demurrable in failing to allege that plaintiff was under any duty to be at the place where he was injured.—South Bend Chilled Plow Co. v. Cissne, Ind., 74 N. E. Rep. 282.

103. MASTER AND SERVANT—Concurrent Negligence.—A railroad is liable for the death of a servant, occasioned by the concurrence of its negligence with an act of God.—Gulf, C. & S. F. Ry. Co. v. Boyce, Tex., 87 S. W. Rep. 395.

104. MASTER AND SERVANT—Contributory Negligence.—Railroad switchman held not guilty of contributory negligence in failing to keep a lookout or give signals.—Missouri, K. & T. Ry. Co. of Texas v. Kellerman, Tex., 87 S. W. Rep. 401.

105. MASTER AND SERVANT—Dangers of Employment.—The knowledge of an employee of the dangers incident to her work on a machine obviates the necessity for the employer to particularly instruct her as to guarding against such dangers.—Daniels v. New England Cotton Yarn Co., Mass., 74 N. E. Rep. 332.

106. MASTER AND SERVANT—Duty of Master to Instruct.—Where an inexperienced servant was injured because of a want of instructions, the master was liable, regardless of the rank of the person to whom the duty to instruct had been assigned.—Flickner v. Lambert, Ind., 74 N. E. Rep. 263.

107. MASTER AND SERVANT—Fellow Servants.—An employee of a railroad, while being transported to his work on the train of his employer, is a fellow servant of the trainmen.—Baltimore & O. S. W. R. Co. v. Clapp, Ind., 74 N. E. Rep. 267.

108. MASTER AND SERVANT—Unanticipated Dangers.—Master held not bound to furnish a mask to protect from explosion a servant handling bottles filled with charged mineral water which had never been known to explode.—Dullnig v. G. A. Duerler Mfg. Co., Tex., 87 S. W. Rep. 332.

109. MECHANIC'S LIEN—Abandonment of Contract.—Where a contractor abandoned his contract, and the owner was compelled to pay an additional sum to complete the building, he was entitled to deduct such sum from the amount for which he was liable to subcontractors.—L. A. Page & Son v. Grant, Iowa, 103 N. W. Rep. 124.

110. MINES AND MINERALS—Sale of Interest in Mining Partnership.—A partner in a mining partnership may convey his interest in the mine and business without dissolving the partnership.—Blackmarr v. Williamson, W. Va., 50 S. E. Rep. 254.

111. MINES AND MINERALS—Sale of Land, Reserving Ownership of Oil and Gas.—Petroleum oil and natural gas may be severed, free from the ownership of the surface by grant or exception.—Preston v. White, W. Va., 50 S. E. Rep. 236.

112. MONOPOLIES—Municipal Ordinance.—A municipal ordinance, giving exclusive privilege of removing all house offal within the city to a person specially appointed, is not void as creating a monopoly.—State v. Robb, Me., 60 Atl. Rep. 874.

113. MORTGAGES—Death of Trustee.—In a suit to foreclose a trust deed, the chancery court will not let the trust fail because of the death of the trustee.—Lesser v. English, Ark., 87 S. W. Rep. 447.

114. MORTGAGES—Value of Property Mortgaged.—The giving of a mortgage on a stock of goods worth more

than the debt secured held not to invalidate the mortgage.—Ward v. Parker, Iowa, 103 N. W. Rep. 104.

115. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A complaint for injury to a pedestrian by running into an unguarded stone while going along the sidewalk in the dark held not to show negligence.—City of Vincennes v. Spees, Ind., 74 N. E. Rep. 277.

116. MUNICIPAL CORPORATIONS—Defective Streets.—A traveler on a highway, injured by reason of a defective street, held guilty of contributory negligence as a matter of law.—Harvey v. City of Malden, Mass., 74 N. E. Rep. 327.

117. MUNICIPAL CORPORATIONS—Irregularity of Ordinance Authorizing a Street Improvement.—That an ordinance authorizing a street improvement was voted on at the same time as another ordinance does not prevent the contractor from recovering for the performance of the work.—Weatherhead v. Cody, Ky., 85 S. W. Rep. 1099.

118. MUNICIPAL CORPORATIONS—Ordinance Granting Monopoly of Removing House Offal.—If an ordinance is invalid in so far as it prohibits the removal of offal in a proper manner by defendant from his own premises, the remainder of the ordinance, prohibiting the removal from the premises of other persons, is valid.—State v. Robb, Me., 60 Atl. Rep. 874.

119. MUNICIPAL CORPORATIONS—Permit to Close Street.—A "permit to close a street" is not a vote closing the street to public travel.—Jones v. City of Boston, Mass., 74 N. E. Rep. 295.

120. MUNICIPAL CORPORATIONS—Validity of Franchise to Telephone Company.—An ordinance granting a telephone company the right to use city streets held not void for failure of the record to show the name of each member of the council voting, with his vote thereon.—State v. Nebraska Telephone Co., Iowa, 103 N. W. Rep. 120.

121. NEGLIGENCE — Comparative Negligence. — The doctrine of comparative negligence does not prevail in Kansas.—Missouri, K. & T. Ry. Co. of Texas v. Kellerman, Tex., 87 S. W. Rep., 401.

122. PARTITION—Deceased Tenant in Common.—Where a partition decree divided certain rents among the heirs, it could not be presumed, as against the administrator of a deceased tenant in common, that she died without debts.—Perkins v. Goddin, Mo., 85 S. W. Rep. 936.

123. PARTITION Trespass to Try Title.—In trespass to try title, partition cannot be had where all the interested parties are not parties to the action.—Keith v. Keith, Tex., 87 S. W. Rep. 384.

124. PARTNERSHIP—Abandonment.—One partner cannot sue another at law for a balance due him after the abandonment of the partnership enterprise, where no settlement or promise to pay has been made.—McGinty v. Orr, Mo., 85 S. W. Rep. 955.

125. PARTNERSHIP—Bills and Notes.—Where a note is purchased by a firm, but indorsed and delivered to one member, who sues thereon, the preceeds are held by him in trust for the firm.—Barber v. Stroub, Mo., 85 S. W. Rep. 915.

126. PASSENGER — Injury to Alighting Passenger. — Though a passenger alighted when the train was moving, it was a question for the jury whether he was guilty of contributory negligence.—St. Louis Southwestern Ry. Co. of Texas v. Ratley, Tex., 87 S. W. Rep. 407.

127. PAYMENT—Mistake.—Where payments of interest were made on a mortgage under the mistaken belief that defendants had title to the property, they could recover them as a counter claim in an action on a note.—Iowa Loan & Trust Co. v. Schnose, S. Dak., 103 N. W. Rep. 22.

128. PLEADING—Irrelevant Matters. — Where a complaint mingles with allegations proper to state a cause of action irrelevant matter, the proper remedy is by motion to strike, and not by demurrer. — Tittle v. Kennedy, S. Car., 50 S. E. Rep. 544.

129. PRINCIPAL AND AGENT—Power Coupled with Interest.—One authorized to improve land and reimburse himself out of the proceeds of the sale held entitled, after the death of the party conferring the power, to reimbursement out of the proceeds of the land when sold.—Fisher v. Southern Loan & Trust Co., N. Car., 50 S. E. Rep. 592.

130. PRINCIPAL AND AGENT—Power of Attorney.—A power of attorney, authorizing a sale for cash or notes, does not authorize the execution of a deed without consideration.—Rogers v. Tompkins, Tex., 87 S. W. Rep. 379.

131. PRINCIPAL AND SURETY—Release of Surety.—Surrender of a collateral note by the creditor, in return for renewal note, without consent of his surety, held not to discharge the latter, in the absence of proof that it resulted in actual injury to him.—North Ave. Sav. Bank v. Hayes, Mass., 74 N. E. Rep 311.

132. PUBLIC LANDS—Department Decisions.—A decision of the secretary of the interior in a land contest should be sustained by the courts, in the absence of clear reasons for overthrowing it.—Sanford v. King, S. Dak., 103 N. W. Rep. 28.

133. PUBLIC LANDS — Pastures. — Plaintiff, having inclosed certain land, held not required to fence off a portion thereof subsequently sold by the state to defendant, in order to protect himself against defendant's stock.—Lyons v. Slaughter, Tex., 87 S. W. Rep. 182.

134. RAILROADS — Contract to Locate Its Shops and Offices in Texas.—On repudiation by defendant railroad of contracts to perpetually maintain its offices and shops in plaintiff city, plaintiff held entitled to recover considerations passed.—City of Tyler v. St. Louis Southwestern Ry. Co. of Texas, Tex., 87 S. W. Rep. 238.

135. RAILROADS—Death of Flagman.—A city railroad speed ordinance held for the benefit of a railroad crossing flagman, as well as third persons, and applicable to an action for his death while walking on the track.—Louisville & N. R. Co. v. Martin, Tenn., 87 S. W. Rep. 418.

136. RAILROADS—Duty to Fence Track.—In an action against a railroad for failure to fence as required by Rev. St. 1889, § 1105, charge held to sufficiently require a finding that defendant's neglect was proximate cause of injury to plaintiff's horse.—Reed v. Chicago & A. Ry. Co., Mo., 87 S. W. Rep. 65.

137. RAILROADS — Fellow Servants.—Foreman of the water supply of a division of a railroad held not a fellow servant with an engineer with whom he was riding.—Stuber v. Louisville & N. R. Co., Tenn., 87 S. W. Rep. 411.

138. RAILROADS — Liability of Purchaser. — The purchaser of a railroad, its franchises, and property, at a judicial sale held not liable for violation of the personal contracts of the judgment defendant, which was the preceding company.—Hukle v. Atchison, T. & S. F. Ry. Co., Kan., 80 Pac. Rep. 603.

139. RECEIVERS—Administration Suits.—Parties interested in a decedent's estate heavily incumbered and liable to be sacrificed held entitled to the aid of the court by the appointment of a receiver, adjustment of claims, etc.—Fisher v. Southern Loan & Trust Co., N. Car., 50 S. E. Rep. 592.

140. RECEIVERS — Unwarranted Continuation of Receivership.—Owner of land held not entitled to complain of an arrangement whereby a receiver having possession of the land was to retain possession until debts of the owner to the receiver had been paid.—Davis v. Atkinson, Ark., 87 S. W. Rep. 432.

141. RELEASE—Fraud in Procurement.—In an action for injuries, plaintiff held not required to tender to defendant the amount paid by him for medical services rendered to plaintiff as a condition to plaintiff's right to sent aside a release for fraud.—Glisson v. Paducah Ry. & Light Co., Ky., 87 S. W. Rep. 305.

142. SALES — Action Against Seller. — In an action against a seller of an ice machine by the purchaser for failure to deliver, the method of computing the net lost profits which plaintiff would have made with the machine determined.—Fred W. Wolf Co. v. Galbraith, Tex., 87 S. W. Rep. 390.

148. SPECIFIC PERFORMANCE—Sale of Land.—Equity will not enforce the specific performance of a contract for the sale of land, unless the equities are clearly with the party seeking relief.—Brown v. Widen, Iowa, 108 N. W. Rep. 158.

144. TAXATION—Confirmation of Tax Title.—The fact that an applicant for the confirmation of a tax title had agreed to sell the land held not to deprive the court of jurisdiction to confirm the title.—Ingram v. Sherwood's Heirs, Ark., 87 S. W. Rep. 435.

145. TAXATION—Notice of Application for Tax Deed.—Whether notice of application for a tax deed was properly served upon the legal owner and person in possession of the land is a question of fact.—State v. Conghran, S. Dak., 108 N. W. Rep. 31.

146. TAXATION—Retrospective Assessment.—That an assessor improperly accepted a trustee's return and levied taxes thereunder held not to entitle the trustee to claim that the city was bound by such assessment.—Bell's Trustee v. City of Lexington, Ky., 85 S. W. Rep. 1081.

147. TELEGRAPHS AND TELEPHONES—Delay in Delivery.—Where, in action for delay in delivery of telegram, defendant pleads the general denial, he may show that the injury was caused by the negligence of plaintiff.—Mitchiner v. Western Union Tel. Co., S. Car., 50 S. E. Rep. 190.

148. TELEGRAPHS AND TELEPHONES—Mental Anguish Due to Delay in Delivery.—Delay in delivery of message held not to render telegraph company liable for mental anguish to sendee's wife, because of her inability to attend burial of grandchild whose death the message announced.—Cranford v. Western Union Tel. Co., N. Car., 50 S. E. Rep. 585.

149. TELEGRAPHS AND TELEPHONES—Pleading "Mental Anguish" as Damages.—Where message does not show plaintiff's wife and baby connected with transmission, telegraph company held not liable for mental anguish of plaintiff caused by suffering of wife and child because of its nondelivery.—Jones v. Western Union Tel. Co., S. Car., 50 S. E. Rep. 198.

150. TENANCY IN COMMON—Trespass to Try Title.—One co-tenant may maintain an action for possession against a trespasser, and the recovery inures to the benefit of the other co-tenant.—Keith v. Keith, Tex., 87 S. W. Rep. 884.

151. TRIAL—Directed Verdicts.—A verdict may be directed only where the evidence is of such a conclusive character that there is no room for ordinary minds to differ as to the conclusion to be drawn therefrom.—Long v. Red River, T. & S. Ry. Co., Tex., 85 S. W. Rep. 1048.

152. TRIAL—Effect of Both Parties Moving for Directed Verdict.—Where both parties move for a directed verdict, the court may draw any inferences from the facts which the jury might have drawn.—Sundling v. Willey, S. Dak., 108 N. W. Rep. 38.

153. TRIAL—Instructions.— where a judge fully explained the issues, refusal of a request that the jury were not to consider evidence disclosing other issues, except they threw light on the issues in the case held no reason for grant of new trial.—Morrison v. Dickey, Ga., 50 S. E. Rep. 178.

154. TRIAL—Instructions in Negligence Case.— In an action against a street railroad for injuries, a charge which authorized a recovery by plaintiff for any act of negligence without limitation to the acts charged in petition held erroneous.—Schroeder v. St. Louis Transit Co., Mo., 85 S. W. Rep. 968.

155. TRIAL—Polling Jury as to Special Findings.—A jury having been polled as to their general verdict, it was not error to poll them in mass as to their special findings.—Norman v. Hopper, Wash., 80 Pac. Rep. 551.

156. TRIAL—Self-Defense.—Where, on trial for murder, defendant pleads self-defense, the absence of any other probable means of escape must be shown by a preponderance of evidence.—State v. Thrailkill, S. Car., Rep. 551.

157. TRIAL—Special Interrogatories.—Answers to interrogatories will prevail over a general verdict only when the conflict cannot be removed by any evidence legitimately admissible.—Flickner v. Lambert, Ind., 74 N. E. Rep. 263.

158. TRUSTS—Implied Power to Sell Real Estate.—The usual rule adopted by the courts is to find in language imposing upon an executor or trustee the duty of disposing of a mixed fund or property an implied power to sell real estate, to the end that he may discharge such duty.—Foil v. Newsome, N. Car., 50 S. E. Rep. 597.

159. VENDOR AND PURCHASER—Breach of Contract for Sale of Land.—A vendee's failure to plead his right to rents and profits as a set-off in an action for the price of real estate sold held not to preclude his recovery thereof in a subsequent action therefor.—Ferguson v. Epperly, Iowa, 103 N. W. Rep. 94.

160. WATERS AND WATER COURSES—Contract to Supply Water.—Failure of water company to supply at all times an amount of water sufficient to extinguish fires, resulting in the destruction of property, held proximate cause of the loss.—Harris & Cole Bros. v. Columbia Water & Light Co., Tenn., 85 S. W. Rep. 897.

161. WATERS AND WATER COURSES—Irrigation by Riparian Owner.—The use of water by the riparian proprietor for irrigation must be exercised with due regard to the equal right of every other riparian owner.—Clark v. Allaman, Kan., 80 Pac. Rep. 571.

162 WATERS AND WATER COURSES—Prescriptive Right to Flow Land.—While the owner of land sustains no damage by flowage from dam, he cannot be presumed to have granted any of his legal rights.—Foster v. Sebago Imp. Co., Me., 60 Atl. Rep. 894.

163. WATERS AND WATER COURSES—Riparian Rights.—The rules of the common law as to the rights of riparian owners in water of running streams were adapted to the conditions of the early settlers of the territory and state of Kansas, and no customs contrary to them were recognized.—Clark v. Allaman, Kan., 80 Pac. Rep. 571.

164. WILLS—Conditions Subsequent.—A provision in a will that, if testator's sons should marry "common women," their interest in the devise should cease, held a condition subsequent, and did not prevent the vesting of the estate.—Watts v. Griffin, N. Car., 50 S. E. Rep. 218.

165. WILLS — Divorce Subsequent to Making. — A bequest to "my wife M. B." is not revoked by implication, because subsequently the wife procured an absolute divorce.—*In re* Jones Estate, Pa., 60 Atl. Rep. 915.

166. WILLS—Election of Widow to Take Under Will.—The election of a widow to take under the will of her deceased husband is binding on her representatives.—Bowers v. McGavock, Tenn., 85 S. W. Rep. 893.

167. WILLS—Sale of Land.—The residuary clause in a will, directing the trustee thereunder to invest "said estate" and to pay the interest or income accruing therefrom to testator's daughter, held to include real, as well as personal property.—Foil v. Newsome, N. Car., 50 S. E. Rep. 597.

168. WILLS — Specific and Distributive Legatees. — A specific legacy is adeemed by the extinguishment of the specific thing or fund bequeathed, while a demonstrative legacy is still payable out of the general assets if the fund specifically mentioned fails.—*In re* Stilphen, Me., 60 Atl. Rep. 888.

169. WITNESSES—Cross-Examination of Hostile Witness.—Where the state has been entrapped by hostile witness, it may examine the witness as to contrary declarations, and may show what such contrary declarations were, on the cross-examination.—State v. Moon, Kan., 80 Pac. Rep. 597.

170. WITNESSES—Refreshing Memory from Evidence Given at Former Trial.—Where a witness was reluctant or his memory was clouded, it was in the discretion of the court to permit him to be examined by referring to his evidence given on a former trial and preserved in the bill of exceptions.—Ashby v. Elsberry & N. H. Gravel Road Co., Mo., 85 S. W. Rep. 957.